

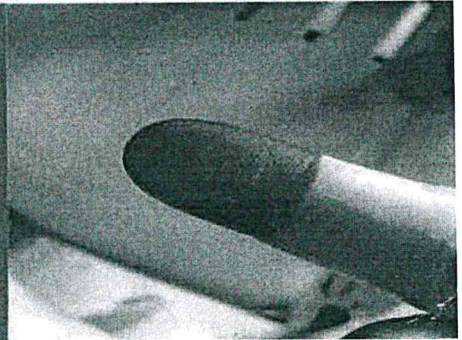
HANDBOOK ON ELECTION DISPUTES IN KENYA

CONTEXT

LEGAL FRAMEWORK

INSTITUTIONS

JURISPRUDENCE



Handbook on Election Disputes in Kenya

Context, Legal Framework, Institutions and
Jurisprudence

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Contents

About the Editor and Authors.....	iv
Foreword.....	vii
Acknowledgements	ix
Editor's Note.....	x
Chapter 1	1
Realizing the Transformative Promise of the 2010 Constitution and New Electoral Laws.....	1
Godfrey M Musila§	1
Chapter 2	22
Constitutionalism, the Rule of Law and Human Rights in Kenya's Electoral Process Ben Sihanya§	22
Chapter 3	57
Resolution of Electoral Disputes in Kenya: An Audit of Past Court Decisions.....	57
Muthomi Thiankolu.....	57
Chapter 4	96
The Legal Framework on Resolution of Election Disputes in Kenya.....	96
Elisha Z Ongoya	96
Chapter 5	151
The Role of Institutions in the Resolution of Election Disputes in Kenya.....	151
Elisha Z Ongoya	151
Chapter 6	178
Conclusions and Recommendations.....	178
Godfrey Musila.....	178

Chapter 5

The Role of Institutions in the Resolution of Election Disputes in Kenya

Elisha Z Ongoya^Σ

Contents

Elisha Z Ongoya	151
Introduction.....	152
Various Forms of Electoral Disputes and the Institutional Framework for their Resolution	153
Disputes Relating to Delimitation of Electoral Area Boundaries	153
Political Party Disputes.....	154
Disputes Relating to Nominations	157
Disputes Relating to Voter Registration	158
Disputes Relating to Campaigns: Election offences and breaches of the Electoral Code of Conduct.....	159
Disputes in the Nature of Election offences	160
Disputes in the nature of breaches of the Electoral Code of Conduct	161
The role of the IEBC in the Enforcement of the Electoral Code of Conduct	161
The Role of the High Court in the enforcement of the Electoral Code of Conduct	163
Disputes Relating to Political Rights of Citizens.....	163
Disputes Relating to Election Petitions.....	164
The Role of the Supreme Court in Election Petitions.....	164
The Role of the High Court in Election Petitions	167
The Role of Magistrates' Courts in Election Petitions	168
The Role of the Court of Appeal in Election Petitions	168
Potential Appellate Jurisdiction of the Supreme Court in Election Petitions	169
Gaps, Silences, Abeyances and Inconsistencies in the Institutional Framework on Election Dispute Resolution.....	173
The Right of Appeal under Section 41 of the Political Parties Act	174
Overlap in Jurisdiction of PPDT, High Court and IEBC in respect of Certain Electoral Disputes	174
Conclusion and Recommendations.....	175

Abstract

Mechanisms for electoral disputes resolution are an integral part of the tests for free and fair

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elections in democratic set-ups. And yet, the efficacy of the mechanisms for dispute resolution is as much dependant on the normative superstructure as it is on the institutional infrastructure. The interplay between institutions to avoid conflict in jurisdictions is an important consideration in the architecture and design of institutions for electoral disputes resolution. As the Kenyan experiment of the past demonstrates, a failure of the electorate to repose confidence in proper institutions for electoral dispute resolution is a recipe for chaos and disaster. This centralizes even more the place of electoral dispute resolution institutions in a democracy. It is against the foregoing background that this chapter interrogates the role of the various institutions in electoral disputes resolution in Kenya. This chapter examines the various provisions of the law establishing and vesting jurisdiction in the various institutions that play a role in the management and resolution of electoral disputes. The chapter also looks at the emerging jurisprudence of the courts and other institutions that have tried to give an interpretation to the relevant provisions of the law on the establishment and jurisdiction of these institutions. Recommendations for reforms are consequently made at the end of this chapter.

Introduction

In this chapter, we isolate and discuss the various institutions that play various roles in resolution of electoral disputes in Kenya. The existence of and characteristics of dispute resolution mechanisms are part of the indicia for free and fair elections. An electoral process that lacks sound mechanisms for dispute resolution cannot pass the free and fair test.

Election dispute resolution is a system of judicial or quasi-judicial mechanisms through which electoral actions can be legally challenged and electoral rights protected. It also refers to the original submission of an application for relief from a violation of electoral law or regulations. In Kenya, such relief can be sought either at the pre-election phase or at the post-election phase.

Jurisdiction for resolving political and election disputes rests with:

- Political parties (internal mechanism as per the constitution of parties)
- Registrar of Political Parties
- Political Parties Dispute Tribunal (PPDT)
- Independent Electoral and Boundaries Commission
- High Court (elections at County, Governor, Senate, National Assembly as well as enforcement of political rights)
- Magistrates Court (County Representative elections)

- Supreme Court (Presidential Elections)

The foregoing institutions play varying roles in varying categories of disputes under Kenya's electoral law. For purposes of discussing this theme, this chapter identifies various stages/forms of disputes in the electoral process and the institutions that are tasked with the responsibility of resolving disputes at each of these stages. The chapter then concludes by making out a case for reform in the various areas where it identifies gaps, silences, inconsistencies and abeyances.

Various Forms of Electoral Disputes and the Institutional Framework for their Resolution

Owing to some of the overlapping roles of institutions in various aspects of electoral disputes, the approach of this chapter is to identify the various types of disputes in the electoral process and then set out the various institutions and the specific roles they play in resolving these kinds of disputes.

Disputes Relating to Delimitation of Electoral Area Boundaries

Delimitation of boundaries of electoral areas is an important foundation of the electoral process. It is at the core of the concept of representation that underlies our electoral system. Like any other aspect of our electoral system, it is bound to arouse disputes. Indeed, the first review of constituency and ward boundaries under the Constitution of Kenya 2010 revealed that review of boundaries by its very nature is a very contentious question. Over 120 disputes were presented to court from various areas in the country on the delimitation of boundaries.

The institutional arrangement for resolution of disputes relating to delimitation of electoral area boundaries is derivable from the Constitution itself. Article 89 of the Constitution of Kenya 2010 sets out the guiding factors and principles in delimitation of constituency and ward boundaries. It takes the form of review of names and boundaries of constituencies and the number, names and boundaries of wards.

Article 89(10) of the Constitution grants any person the right to apply to the High Court for review of the decision of the IEBC, regarding delimitation of constituency names and boundaries as well as ward names, number and boundaries. Since, inevitably, such a decision and application for review entails an application and interpretation of the constitution, a right of appeal exists from such a decision of the High Court to the Court of Appeal and consequently to the Supreme Court as of right.

The Court of Appeal had occasion to pronounce itself on the exact scope of the jurisdiction of the High Court on matters relating to delimitation of electoral boundaries, or rather, the limits to such scope of jurisdiction in *Ex-Chef Peter Odoyo Ogada & Others v Independent Electoral and Boundaries Commission & 14 Others*.¹ The Court of Appeal took the view that while the High Court is empowered by Articles 165 and 89(10) of the Constitution to review the boundary delimitation decisions by IEBC, this power is not unlimited and must be exercised in conformity with the law. In its view, the High Court cannot substitute itself for the IEBC and that its power is limited to establishing whether IEBC acted legally and to recommend IEBC to take corrective action, including redoing the process afresh.

Our reading of Article 89 does not yield or point to authority or jurisdiction of the High Court, while exercising the power of review under that Article to substitute the decision of the IEBC with its own. Article 89 (10) does not give room for the High Court to put its own decision on delimitation of electoral boundaries in place of that made by the IEBC. It can only find fault with it and order a fresh exercise. This we say because the High Court cannot and is not mandated to go, meet and consult residents of a given area, take their views on various aspects which go into delimitation before deciding accordingly, be it on boundaries or names that is the mandate of IEBC. The time to do that, the resources, sources of expertise required to perform these exercises is within the constitutional mandate of IEBC and IEBC alone.

The position taken by the Court of Appeal is, in its view partly aimed at fostering respect and specialization among constitutional bodies mandated by law to perform certain functions:

... [it] is to do with respecting each other's areas of operation and particularly where the areas have been "delimited" by law. It is good practice intended to foster public confidence and trust to let each organ perform its mandate. But this performance should only be within the limits of the law, good faith and integrity.

Political Party Disputes

Like other mechanisms for electoral dispute resolution in Kenya, dispute resolution mechanisms within political parties, as prescribed by law, was largely informed by the political and electoral context in Kenya. Weak political parties as institutions, lack of internal democracy within political parties, undemocratic party nomination processes and lack of effective dispute

¹ *Ex-Chef Peter Odoyo Ogada & Others v Independent Electoral and Boundaries Commission & 14 Others*, Court of Appeal at Nairobi, Civil Appeal No. 307 of 2012 [2013]eKLR

resolution mechanisms within political parties were some of the factors that influenced the shape of the law and the institutional framework as we know it today.

Section 39 of the Political Parties Act establishes the Political Parties Dispute Tribunal (PPDT) to determine disputes arising from political parties. Under Section 40 of the Political Parties Act, the PPDT has both original and appellate jurisdiction which include: ²

- a) disputes between the members of a political party;
- b) disputes between a member of a political party and a political party;
- c) disputes between political parties;
- d) disputes between an independent candidate and a political party;
- e) disputes between coalition partners; and
- f) appeals from decisions of the Registrar of Political Parties under this Act.

Section 40(2) of the Political Parties Act then prescribes that:

Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a) (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.

From the foregoing statutory prescriptions, save for disputes (d) and (f), two institutional mechanisms exist for resolving political party disputes, namely, the internal political party dispute resolution mechanisms as established by the individual political parties' constitutions, and, the Political Parties Disputes Tribunal as established under the Political Parties Act 2011. It is important to note that a dispute is only admissible before the Political Parties Dispute Tribunal once one has *exhausted* mechanisms within the party.

This primacy of the internal party dispute resolution mechanisms followed by the tribunal as a forum of dispute resolution before one takes recourse to the jurisdiction of mainstream courts has been reaffirmed in a number of cases.

In the case of *Stephen Asura & Others v the Orange Democratic Movement Party & Others*³, the petitioners sought to restrain the confirmation of the grass root elections of the 1st Respondent in respect of Makadara constituency held at City Hall in Starehe Constituency. They argued that the

² Section 40(1) of the Political Parties Act 2011

³ High Court Petition Number 288 of 2011

conduct of the said elections of the party were unconstitutional. They also sought to have the matter referred to arbitration by the court. The High Court held that it did not have jurisdiction over the matter in light of the nature of the dispute and the parties involved. The court ordered the 1st Respondent to put in place mechanisms for resolving the petitioner's grievances failing which the petitioners would have recourse to the Political Parties Disputes Tribunal.

In the case of *Engineer Ephraim Maina v the Independent Electoral and Boundaries Commission*⁴, the petitioner challenged the constitutionality of the decision of Safina party to expel him from the party as it was likely to lead to the loss of his seat as a Member of Parliament for Mathira constituency. The High Court held that the petitioner was under an obligation to exhaust the internal party dispute resolution mechanism. If aggrieved at the party level or if the party refused to activate the party mechanism, the court held further, the petitioner would have to make recourse to the Political Parties Disputes Tribunal.

It is arguable, particularly considering the jurisprudence from the two decisions above, that this requirement of exhaustion of internal party dispute resolution mechanisms is applicable only where there exist effective mechanisms for resolution of disputes within the party. It would be elevating this innocent provision of the law to the level of fetish if the tribunal or court were to insist on exhaustion of internal party dispute resolution mechanisms if it is demonstrated that such mechanisms are *prima facie* ineffective and cannot deliver the requisite remedy or are designed to be cumbersome.

There are instances where insisting on exhaustion of internal party mechanisms would defeat the ends of justice. One case is where a political party's constitution or other regulations were to provide that a nomination dispute is to be resolved by the institution of a national delegates conference of the party and the same constitution provides further that such a delegates' conference can only be called by giving a 30-day notice to the delegates. The other scenario is where the political party conducts its nomination of candidates to elections, as is often the case in Kenya, on the eve of the date set for submission of the parties' lists of candidates to the IEBC. Is it practical to tell a dissatisfied member to seek relief from such party before coming to the tribunal? It is partly on these practical considerations that we urge a carefully reasoned approach that considers each case on its merit. A rigid approach that insists on exhaustion of internal party mechanisms in all cases would result in injustice.

⁴ High Court Petition Number 220 of 2011

A better remedy for this kind of situation, however, lies with the office of the registrar of political parties. Since this is the office that registers political parties, it is necessary that the office interrogates the prescribed dispute resolution clauses of the parties' constitutions as a prerequisite to registering the party. Where such mechanisms are found to be inherently wanting, this should be a ground for refusal of registration. If this proposal were followed, then scenarios where the tribunal has to engage on the question of efficacy of the internal party dispute resolution mechanisms will be minimal.

The Political Parties Act also provides for an elaborate right of appeal from the decision of the PPDT. An Appeal lies from the decision of the Tribunal to the High Court on points of law and facts and on points of law to both the Court of Appeal and the Supreme Court.⁵

It shall be demonstrated below, as we interrogate inconsistencies in the dispute resolution mechanisms, that this automatic right of appeal to the Supreme Court on points of law as set out in the Act would appear to infringe the provisions of Article 163 of the Constitution on the appellate jurisdiction of the Supreme Court of Kenya.

Disputes Relating to Nominations

The term nomination is used in two senses in our electoral laws; the process of selecting or clearing candidates to contest for various elective offices by political parties and or the IEBC and; the process of clearing candidates for various special seats in representative bodies commonly known as "nominated members" either of the Senate, the National Assembly and or County Assembly.

Curiously, the term "nomination" as used in the Elections Act is defined to mean "the submission to the Commission of the name of a candidate in accordance with the Constitution and this Act."⁶ It is curious because it is a rather restrictive definition of the term. It does not include the processes preceding the submission to the commission of the name of a candidate. The process commonly known in our country's political parlance of "party primaries" which is a critical nomination stage is not captured in this definition.

Article 88 of the Constitution vests various responsibilities on the IEBC among them "the settlement of electoral disputes including disputes relating to and arising from nominations but

⁵ Section 41(2) of the Political Parties Act 2011

⁶ Section 2 of the Act

excluding election petitions and disputes subsequent to the declaration of election results⁷. Similarly, Section 74 (1) of the Elections Act reproduces the terms of Article 88 stating that:

Pursuant to Article 88 (4) (e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

Section 77(2) of the Elections Act enacts that an electoral dispute under subsection (1) shall be determined within seven days of lodging of the dispute with the Commission. For its part, section 77(3) states that:

Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.

It is apparent from the foregoing that the IEBC has far reaching powers of dispute resolution particularly in the process preceding the final declaration of election results. As shall be demonstrated in the section on gaps, silences, abeyances, and inconsistencies below, these rather wide powers of the Commission overlap with the powers of the High Court, the PPDT among other institutions.

Disputes Relating to Voter Registration

Voter registration is the process of recruiting/registering eligible voters to participate in the elections. This process is dealt with substantively in Part 2 of the Elections Act 2011 under the rubric 'Registration of Voters and Determination of Questions concerning Registration'.

Dispute concerning voter registration normally take the form of claims and objections. Section 12 of the Elections Act deals with the jurisdiction of dealing with claims. Pursuant to Section 12, a person who has duly applied to be registered and whose name is not included in the register of voters may submit a claim for the name to be included in the register to the registration officer in the prescribed form and manner and within the prescribed time. Subject to the Constitution, such a claim shall be determined by the registration officer in the prescribed manner, and an appeal shall lie in the prescribed manner, to the Principal Magistrates Court on matters of fact and law and to the High Court on matters of law.

⁷ Article 88 (4)(e) of the Constitution of Kenya 2010.

Further provision in relation to resolution of disputes relating to registration of voters is also made in the Rules of Procedure on Settlement of Disputes, 2012. In exercise of its powers under Article 88(4) of the Constitution and regulation 99 of the Elections (General) Regulations, the IEBC has promulgated the Rules of Procedure on Settlement of Disputes, 2012. These rules make further provision for settlement of disputes or complaints arising from registration of persons as voters⁸.

Any person objecting to the registration of a voter may file a complaint with the commission on any of the following grounds:

- a) that the person has registered in more than one registration centre;
- b) that the person has been convicted of an election offence at any time material to the registration;
- c) that the person is not qualified to be registered under any law⁹.

The rules also mandate the Commission to delegate resolution of all disputes filed under the rules to the Electoral Code of Conduct Enforcement Committee¹⁰ established under regulation 15 of the 2nd Schedule to the Elections Act. As the name suggests, the primary function of the committee is enforcement of the electoral code of conduct.

These rules, therefore, vest further jurisdiction on the Committee. The committee has the powers of a registration officer or a returning officer. These rules do not provide for a right of appeal. Considering that the right of appeal, as a matter of law, is not inherent and must be donated by law, it may be argued that the decisions of this committee or the IEBC under these rules are not subject to appeal. However, a dissatisfied party may still pursue a remedy in the High Court by way of judicial review of administrative actions or by way of a constitutional petition as the case may be.

Disputes Relating to Campaigns: Election offences and breaches of the Electoral Code of Conduct

Campaigns constitute the most emotive phase of the election cycle. Legally, campaigns ought to follow party nominations and must be held within a specified period. In practice, in Kenya,

⁸ Rule 4(1) (a) of the Rules of Procedure on Settlement of Disputes

⁹ Rule 7(1) of the Rules of Procedure on Settlement of Disputes

¹⁰ Rule 14(1) of the Rules

campaigns begin immediately the last election is concluded.

There are two broad categories of disputes that can be experienced during this phase: election offences and violations of the electoral code of conduct.

Disputes in the Nature of Election offences

Offences related to campaigns are elaborately dealt with in the Elections Act 2011.¹¹ These offences include:

- Violence and intimidation
- Incitement or hate speech
- Treating
- Destruction of election materials

A member of the IEBC or any officer designated by the commission may order the arrest of a person who commits an offence under the Elections Act.¹² Further, the commission has the power to prosecute any offences under the Elections Act and to impose sanctions against a person who commits an offence under the Act pending the hearing and determination of the offence.¹³ A further power of the IEBC is the power of a member of the commission or any person designated by the commission to impound or to order the impounding of any state resources that are used in an election campaign.¹⁴

Like any other criminal offences that are not of a capital nature in the first instance, election offences are triable before magistrates' courts in the first instance with a right of appeal to the High Court and a possible second right of appeal to the Court of Appeal.

It is noteworthy that conduct constituting election offences can also constitute, and often does constitute, part of the grievances in election petitions. The election court can declare an election of a particular candidate invalid if it is proved to the court's satisfaction that such candidate or his agents and supporters committed election offences. It is against this background that the Elections Act requires an election court, at the conclusion of the hearing of a petition, to send to the Director of Public Prosecutions, the IEBC and the relevant speaker (National Assembly,

¹¹ Part VI of the Elections Act.

¹² Section 107(1) of the Elections Act 2011

¹³ Section 107(2) of the Elections Act

¹⁴ Section 107(3) of the Elections Act

Senate or County Assembly) a report in writing indicating whether an election offence has been committed by any person in connection with the election, and the names and descriptions of the persons, if any, who may have been proved at the hearing to have been guilty of an election offence.¹⁵

To satisfy the tenets of natural justice, it is a requirement that before such report is made, if that person was not a party to the petition, he/she must be given an opportunity to be heard and to give and call evidence to show cause why he should not be reported.¹⁶ The Act then obligates the relevant speaker to publish the report made under the section in the Gazette and the IEBC is required to consider the report and delete from the register of voters the name of the person who is disqualified as a consequence of the offence in question from being in the register of voters.¹⁷

Disputes in the nature of breaches of the Electoral Code of Conduct

The Electoral Code of Conduct, on the other hand is appended to the Elections Act of 2011 as the 2nd Schedule. Since the code is provided for as a schedule to the Act, it is part and parcel of the Act itself. This means that it is not of the status of subsidiary or delegated legislation in relation to the Act.

Whereas some of the prescriptions of the code appear to rehash the statutory provisions in Part VI of the Act relating to election offences and illegal practices, it is a separate code from those provisions in Part VI of the Act. The code has its own enforcement procedures and its own remedial measures distinct and separate from those that relate to what the statute calls 'election offences and illegal practices'.

Jurisdiction for enforcement of the code is vested on the IEBC and the High Court.

The role of the IEBC in the Enforcement of the Electoral Code of Conduct

Under Section 7 of the Electoral Code of Conduct, where, in the opinion of the Commission, any political party or referendum committee participating in any election or referendum or the leader, office-bearer or member of a political party or person who supports the political party or referendum committee or any candidate at any election, in any way infringes any provision of this Code, the Commission may—

¹⁵ Section 87(1) of the Elections Act.

¹⁶ Section 87(2) of the Elections Act.

¹⁷ Section 87(3) of the Elections Act.

(a) In the case of a political party and, subject to sub-paragraph (b), and in the case of the leader, any office-bearer or member of a political party or person who supports the political party referendum committee or candidate, impose upon that political party one or more of the following penalties or sanctions which any or all may be suspended on specific conditions—

- (i) a formal warning;
- (ii) a fine determined by the Commission;
- (iii) notwithstanding the provisions of any other written law, an order prohibiting the political party, whether permanently or for a specified period, from utilizing any public media time, through the television or radio broadcasting service of such media as have been or may be allocated to the political party for electoral purposes;
- (vi) an order prohibiting the political party, referendum committee or candidate from—
 - (aa) holding particular public meetings, demonstrations or marches, or any kind of meeting, demonstration or march;
 - (bb) entering any specified electoral area for purposes of canvassing for membership, or for any other electoral purpose;
 - (cc) erecting placards or banners, or from publishing and distributing campaign literature;
 - (dd) publishing or distributing campaign literature and electoral advertising or limiting the rights of the political party to do so, and such prohibition or limitation shall be notified to the relevant regulating officers under the Public Order Act in the affected places or electoral areas for purposes of the Act;
 - (ee) in the case of the leader, candidate, an office-bearer or member of a political party or person who supports the political party or referendum committees impose any one or more of the penalties or sanctions referred to in sub-paragraph (a) (i) or (ii) of this paragraph;

(a) Where a political party, referendum committee, leader or any office bearer, member or person who supports the political party, referendum committee or any candidate at an election fails, neglects or refuses to comply with the orders of the Commission issued under paragraph 7 (a), the Commission shall impose upon the defaulting party any of the following sanctions which may be suspended on specific conditions—

- (i) in case of fine imposed, prohibit the defaulting party from participating in ongoing and future elections as candidates in case of a defaulting candidate or prohibit the political party or the referendum committee official from participating in ongoing elections and referendum, and future elections or referendum or any activity facilitated by the Commission until such fine has been paid;
- (ii) in case of failure to comply with any other sanctions imposed, cancel the right of such political party or candidate to participate in the next election; and
- (iii) file execution proceedings in the High Court to enforce the recovery of the fine.

As briefly highlighted above, the Commission is required to set up a Committee known as the Electoral Code of Conduct Enforcement Committee comprising of not less than five members of the Commission.¹⁸ Such Committee exercises the powers provided for under the Code to punish any person found to have infringed the code.

The Role of the High Court in the enforcement of the Electoral Code of Conduct

Section 8 of the Electoral Code of Conduct requires that “A fine imposed by the Commission under this Code shall be registered in the High Court.” In addition, section 9 of the Code of Conduct provides that:

Without prejudice to the provisions of paragraph 7, the Commission may either of its own motion or in consequence of any report made to it, institute proceedings in the High Court as may be appropriate in the case of any alleged infringement of this Code by a political party or by the leader, any office-bearer or member of a political party or person who supports a political party or any candidate and where the Court finds the infringement of the provisions of this Code-

- (a) in the case of a political party, any act or omission involving violence, intimidation or a gross or systematic violation of the rights of any political party, candidate or voter, the Court may, in addition to or in substitution for any other penalty or sanction specified in paragraph 7(a), make an order cancelling the right of such party to participate in the election concerned; or
- (b) in the case of the leader, any office-bearer or member of a political party or person who supports the political party or of any candidate, that any act or omission involving violence or intimidation, or gross or systematic violation of the rights of any political party candidate or voter, the Court may in addition to or in substitution of any other penalty or sanction specified in paragraph 7(a) (i) and (ii), make an order disqualifying, in the case of a person who is a candidate, that person from being a candidate or deleting the name of that candidate from the list or lists of candidates concerned.

In making their respective decisions regarding appropriate penalties or sanctions, the Commission or, as the case may be, the High Court is required to have regard to any other legal consequences that may result from civil or criminal proceedings instituted by reason of the same occurrence.¹⁹

Disputes Relating to Political Rights of Citizens

Article 38 of the Constitution creates a category of rights called political rights. These are rights

¹⁸ Regulation 15 of the Electoral Code of Conduct

¹⁹ Section 10 of the Electoral Code of Conduct

of citizens. This body of rights is framed to have three broad limbs, namely; the right to make political choices, the right to free, fair and regular elections based on universal suffrage and free expression of the will of the electors, and the right of an adult citizen to register as a voter, to vote or to be a candidate. The limb of the right to make political choices entails, among others;

- (a) Forming, or participating in the formation of a political party;
- (b) Participating in the activities or recruitment of members for a political party, or
- (c) Campaigning for a political party or cause.

These political rights are part and parcel of the body of rights that are found in chapter 4 of the Constitution. They are therefore enforceable by Courts within the framework of Article 22 as read with Article 23 of the Constitution. .

Article 22 of the constitution establishes the instrumental right of every person to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. It also makes provision relating to *locusstandi* for institution of such action and delegates to the Chief Justice the power to make procedural rules to facilitate institution and determination of such action. Article 23 on the other hand vests jurisdiction in the High Court to hear and determine applications under Article 22 and also prescribes the remedies that the High Court may give in case of such applications.

Disputes Relating to Election Petitions

These are disputes subsequent to declaration of election results. In terms of institutional framework for resolution of these disputes, the following institutions are key:

- (a) The Supreme Court
- (b) The High Court
- (c) Magistrates' Court

The Role of the Supreme Court in Election Petitions

Article 140(1) of the Constitution provides that a person may file a petition in the Supreme Court to challenge the election of the president-elect within seven days after the date of declaration of the results of the presidential election. Likewise, Article 163(3)(a) of the Constitution vests in the Supreme Court the exclusive jurisdiction to hear and determine disputes relating to the elections to the office of president arising under Article 140 (of the Constitution).

As crafted, the provision leaves lacunae relating to the scope of the jurisdiction of the Supreme Court in presidential election disputes, that is, a dispute limited to the *challenge of the election of the president-elect*. In Kenya's electoral system, it is possible for a presidential race to fail to raise a *president-elect* as defined in law. This is what usually culminates into a re-run.

The apparent limitation in Article 140 was a subject of an advisory opinion by the Supreme Court. In Advisory Opinion No. 2 of 2012²⁰ the court noted (at para 86) that there is a lacuna in Article 140 in the in so far as it failed 1) to recognize that the election of a president is a process and; 2) to provide for a multiplicity of scenarios and disputes (including those relating to a the runner up position as well as those that may relate to aspects preceding the declaration of a President-elect that is the final stage). In this regard, it reasoned as follows:

[...] Election of the President is a *process*, beginning from primary elections to the final election which will lead to the identification of the President-elect. Article 140(1) provides for dispute settlement only at the *final stage*, and not at earlier stages. With no provision on the mode of resolution of disputes at the earlier stages, there would be no express right to seek the Court's intervention, for instance, in respect of the runner-up position. Such a dispute may be, on the facts, one of merit and, therefore, one to be resolved judicially. The urgency of the issue would remain the same as that which attends dispute-settlement in relation to the position of the President-elect; and accordingly, this would still be a contest on *an issue of the Presidential election*. What is the proper jurisdiction for resolving such an issue?

Having identified the variety of issues not contemplated in Article 140 that could become subject of disputes in a presidential election²¹, the Supreme Court states at para 100 as follows:

It is clear to us, in unanimity, that there are potential disputes from Presidential elections *other than* those expressly mentioned in Article 140 of the Constitution. A Presidential election, much like other elected-assembly elections, is not lodged in a *single event*; it is, in effect, a process set in a plurality of stages. Article 137 of the Constitution provides for "qualifications and disqualifications for election as President" — and this touches on the tasks of agencies such as *political parties* which deal with early stages of nomination; it touches also on election management by the Independent Electoral and Boundaries Commission (IEBC). Therefore, outside the framework of the events of the day of Presidential elections, there may well be a contested question falling within the terms of the statute of elections, or of political parties. Yet still, the dispute would still have clear bearing on the conduct of *the Presidential election*.

Noting that they found no reason to presume that the framers of the Constitution intended that the Supreme Court should exercise original jurisdiction only in respect of a specific element

²⁰ In the Matter of the Principle of Gender Representation in the National Assembly and the Senate

²¹ These are: where a dispute emanates from the fact that nobody is elected as President under Article 138(4), and when this fact leads to fresh elections under Article 138(5) [para 97]; disputes involving the runner-up candidate

(disputes arising *after* the election) the Supreme Court Justices took the view (at para 102) that a reading of Article 87(2) alongside Article 163(3) suggests that Supreme Court was intended to adjudicate upon *all* disputes arising from the Presidential election (including disputes arising *during* the conduct of election). The Supreme Court Justice capped this with the following forceful words (at para 104):

It is our unanimous opinion that the validity of the Presidential election is not for determination only *after* the administrative pronouncement of the final result; *at any stage* in the critical steps of the electoral process, the Supreme Court should entertain a dispute as to validity.

The Supreme Court appeared to depart from the position espoused in the Advisory Opinion no 2 of 2012 (in para 104). Following this advisory opinion, and in the run up to the 2013 General Election, exactly 27 days before the March 4 2013 general elections, a petitioner filed an election petition challenging the IEBC's decision to accept the nomination of some of the presidential candidates to contest for the presidency in the 2013 general elections.

The petitioner questioned the actions of the sponsoring political parties in their initial nominations of candidates who would, at the time, be classified as State Officers in the terms of Article 260 of the Constitution of Kenya, 2010. A preliminary objection was raised as to the court's jurisdiction to entertain the petition. In respect of this preliminary objection, the court suggested that the Supreme Court (Presidential Election Petition) Rules 2013 made subsequent to its Advisory Opinion no 2 of 2012 had to an extent modified the Supreme Court's exercise of jurisdiction as contemplated in that advisory opinion. Noting that petitioner's cause was founded entirely on the Advisory Opinion, which was an expression of 'broader principles in an Opinion' rather than the Rules, which constituted '*directly-operative code in specific terms,*' was impermissible and should defeat his cause at the preliminary stage. The court stated at (at para 30 and 31) that:

By the Supreme Court (Presidential Election Petition) Rules, 2013 it is specifically provided that a Presidential-election petition is to be filed only after the declaration of the outcome ... The petitioner's grievance is, thus, provided for: save that he is to seek it after the declaration of election results. He did not tender clearly in Court the cause for pursuing the requisite redress at a premature stage.

Although the Supreme Court acknowledged that the petitioner raised relevant and important issues, it took the view that the petition was premature (para 35):

While it is clear to us that this Court's exclusive original jurisdiction covers the matters in the gravamen of

the petitioner's grievance, the law has defined the time of declaration of Presidential results as the operative moment in the exercise of this jurisdiction. The span of the Court's jurisdiction thus defined, occasions no injustice to the petitioner who is allowed, under the Supreme Court (Presidential Election Petition) Rules, 2013 to raise and canvass every one of his current grievances.

From this brief discussion of the two decisions, it is clear that there is a dissonance in the Supreme Court's jurisprudence relating to its jurisdiction on presidential elections. The Supreme Court was presented an early opportunity to express itself on this issue following the disputed presidential election but failed to do so. This issue should be addressed at the earliest opportunity.

The Role of the High Court in Election Petitions

Article 105 of the Constitution of Kenya provides that:

(1) The High Court shall hear and determine any question whether —

(a) A person has been validly elected as a member of Parliament; or

(b) A seat of a member has become vacant

(2) A question under clause (1) shall be heard and determined within six months of the date of lodging the petition.

To give effect to this Article, as well as other relevant provisions in the constitution, parliament enacted the Elections Act 2011 which underwent a number of amendments before the March 4, 2013 general election. Without more, it is apparent that by instrument of the above cited provision of the Constitution, a challenge to the election of a member of the National Assembly and Senate is to be challenged in the High Court. In this regard, section 75 of the Elections Act provides materially that 'a question as to validity of a county election shall be determined by High Court within the county or nearest to the county'.

A reading of the Elections Act in its entirety as well as the side note to section 75(1) of the Act reveals that this section was intended to provide for the jurisdiction to challenge the election of a County Governor. This is more so because apart from the County Governor's election, the only other county election would be that of a member of the County Assembly, which has a clear and separate jurisdictional provision.

From the foregoing provisions, the High Court has original jurisdiction in respect of election petitions for membership of the National Assembly, Senate as well as Gubernatorial Elections.

The Role of Magistrates' Courts in Election Petitions

The law now vests in Resident Magistrate's Court the jurisdiction to entertain, in the first instance, petitions questioning the validity of an election of the member of a county assembly. By virtue of the Statute Law (Misc) Amendment Act No. 47 of 2012, an amendment was made to the Elections Act 2011. This introduced a new and hitherto non-existent section 1A. The said Section provides that "a question as to validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice."

This section was intended to ease the workload on the High Court which otherwise risked grinding to a halt if all election petitions (except the presidential ones) were to be filed in the High Court in the first instance. By virtue of section 75(4) of the Elections Act, an appeal from the decision of a resident magistrate lies to the High Court. Such an appeal is to be heard and concluded within six months.

The Role of the Court of Appeal in Election Petitions

When the Elections Act 2011 was initially passed, no right of appeal was provided for in respect of the decision of the High Court in election petitions. Statute Law (Misc) Amendments Act No. 47 of 2012 reintroduced the role of the Court of Appeal in election petitions. Section 85A of the Act provides materially thus:

An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of County Governor shall lie to the Court of Appeal on matters of law only and shall be — a) filed within thirty days of the decision of the High Court; and b) heard and determined within six months of the filing of the appeal.

To facilitate the practical realization of this right of appeal, it is necessary that certain administrative measures be put in place during the hearing of the petition at the High Court. For instance, most of the delay in filing of appeals at the Court of Appeal occur due to delays in processing typed proceedings and rulings or judgments of the High Court. These typed records are a precondition to the institution of the appeal.

It is possible, for instance, for the High Court to put in place measures where each judge hearing a petition has a secretary/copy typist attached to them for purposes of typing proceedings at the

end of each day. This will ensure that at the end of the process of hearing the petition, all proceedings have been typed. Consequently, the judge can also ensure that his/her ruling/judgment is typed prior to being delivered. Compliance with this proposal will render it practically possible for a dissatisfied litigant to lodge his/her appeal within the prescribed period of 30 days.

A more serious challenge which is addressed in chapter four of this Handbook on the legal regime governing electoral disputes resolution in Kenya relates to interlocutory appeals (appeals on specific issues while the main petition remains to be finalized by a lower court). If the High Court were to strike out a petition for one reason or the other, and the dissatisfied party appeals to the Court of Appeal, chances are that the appeal could succeed. In those circumstances, the Court of Appeal has one option, that is, to reinstate the petition for hearing on its merits. It may happen that by the time the court of appeal reinstates the petition within the six months period for hearing and determination of appeals, the six months period for hearing and determination of the petition has expired (this period starts to run from the day the petition is lodged at the High Court).

Potential Appellate Jurisdiction of the Supreme Court in Election Petitions

A reading of the relevant provisions of the law would appear to indicate that an appeal to the High Court in respect of petitions challenging membership of the County Assembly and to the Court of Appeal in respect of Membership to Parliament and Gubernatorial elections are final. However, electoral disputes, by their very nature, will entail application of and interpretation of various parts of the constitution.

This then brings to the fore the provisions of Article 163(4)(a) of the Constitution which provides that 'appeals shall lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of this Constitution'

As of now, no dispute has arisen from this scenario to give the courts an opportunity to apply their minds on this possibility. As and when such dispute arises, the courts will have an opportunity to supply certainty to this situation.

Jurisdiction in Electoral Disputes sui generis: Determination of the Election date for the 1st General Election under the Constitution of Kenya 2010

For the avoidance of doubt, the constitution has prescribed a precise date for general election,

that is, the second Tuesday in August every fifth year of Parliament.²² In spite of the foregoing clarity, controversy raged over when precisely the first general election under the constitution should be held in light of the transition provisions of the said constitution.

Precisely, the controversy arose out of the foregoing provisions of the Constitution of Kenya, 2010:

- Article 101 under Chapter 8 of the Constitution of Kenya, 2010, which provides that a general election of members of parliament shall be held on the second Tuesday in August every fifth year.
- Article 136(2)(a) under Chapter 9 of the Constitution of Kenya 2010 which provides that an election for the president shall be held on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year
- Article 177(1) under Chapter 11 of the Constitution which provides that an election of members of the county assembly shall be on the same day as a general election of Members of Parliament, being the second Tuesday in August in every fifth year; and
- Article 180 under Chapter 11 of the constitution, which provides for election of the county governor on the same day as a general election of Members of Parliament, being the second Tuesday in August in every fifth year.

These substantive provisions were to be interpreted and counterbalanced against a number of transitional provisions of the Constitution that are spelt out in the Sixth Schedule of the constitution:

- Section 2(b) and (c) of the Sixth Schedule which materially provides that the provisions of Chapter 8 and Articles 129 to 155 of Chapter 9 of the constitution are suspended until the final announcement of all the results of the first elections for parliament under the Constitution of Kenya, 2010 except that the provisions of Chapter 8 relating to the election of the National Assembly and the Senate and the provisions of Chapter 9 relating to the election of the President shall apply to the first general election under the Constitution.
- Section 2(2) of the Sixth schedule which suspends the provisions of the Constitution relating to devolved government until the date of the first elections for county assemblies and governors under the constitution and section 2(3) which provides that “despite

²² See Articles 101, 136(2)(a), 177(1)(a) and 180(1) of the Constitution.

subsection (2)", elections for county assemblies and governors shall be held in accordance with Articles 177 and 180 of the Constitution.

- Section 9 of the sixth schedule which provides that:
 - i. The first elections for the President, the National Assembly, the senate,, county assemblies and county governors under the constitution shall be held at the same time, within sixty days after dissolution of the National Assembly at the end of its term.
 - ii. Despite (i) above, if the coalition established under the National Accord is dissolved and general elections are held before 2012, elections for the first county assemblies and governors shall be held during 2012.
- Section 10 of the sixth schedule which provides that the National Assembly existing immediately before the effective date shall continue as the National Assembly for the purposes of the constitution for its unexpired term.

The foregoing were the provisions of the Constitution that brought forth conflicting interpretations in the academic, professional and political circles leading to a number of court cases.²³ The Supreme Court found that it in principle, had jurisdiction to entertain the Advisory Opinion. It however, declined to exercise jurisdiction in respect of the question in order to give the High Court an opportunity to deal with the same in the first instance. The matters before the High Court were consolidated and heard together. The High Court considered the issues arising out of the rival petition and responses as the following:

- i. A determination of the question as to when the next general election should be lawfully held.
- ii. A determination as to whether an amendment to the Constitution affecting the term of the President can be proposed, enacted or effected into law without a referendum being held under the constitution.

²³*Re In the Matter of the Interim Independent Electoral Commission as Applicant*, Supreme Court of Kenya, Constitutional Application Number 2 of 2011; *Milton Mugambi Imanyara, Professor Lawrence Gumbe, Martin Muthomi Gitonga v. The Attorney General, Commission for Implementation of the Constitution and Independent Electoral and Boundaries Commission*, High Court Constitutional Petition No. 65 of 2011; *John Harun Mwau v. The Attorney General*, High Court Constitutional Petition No. 123 of 2011; and, *Milton Mugambi Imanyara v The Attorney General*, High Court Constitutional Petition No, 185 of 2011.

- iii. A determination whether the unexpired term of the existing members of Parliament includes terms and conditions of service.
- iv. A determination whether the President has power or authority to dissolve Parliament under the current constitution.
- v. Who should bear the costs of the petitions as consolidated?
- vi. Whether this court had jurisdiction to determine the matter.
- vii. Which body under the Constitution has the Constitutional responsibility to fix the election date.

The foregoing court cases culminated into the understandably controversial decision of the three-judge bench of the High Court delivered on 13th January 2012 which established the date of the first general election under the Constitution as determinable by a formula and made the findings on the framed issues as follows:

- i. We have jurisdiction to determine this matter and it is founded on two grounds. First, failure to hold the first elections on a date fixed in accordance with the provisions Constitution would be a threat to the Constitution and therefore any party is entitled to move the court under Article 258(1) for appropriate relief. Secondly, the Supreme Court in *Constitutional Application No. 2 of 2011* directed this court to determine the petitions before it having been satisfied that we have jurisdiction.
- ii. The date of the first elections under the Constitution is determined by reference to section 9 and 10 of the Sixth Schedule as follows;
 - (a) In the year 2012, within sixty days from the date on which the *National Coalition is dissolved by written agreement between the President and Prime Minister* in accordance with section 6(b) of the *National Accord and Reconciliation Act, 2008*;
or
 - (b) Upon the expiry of the term of the 10th Parliament on the 5th Anniversary of the day it first sat which is designated by Legal Notice No. 1 of 2008 as 15th January 2008. The term therefore expires on 14th January 2013. The elections shall be held within sixty days of 15th January 2013.
- iii. Following the repeal of the former Constitution and together with it section 59 thereof

and in the absence of a specific provision entitling the President to dissolve Parliament, the President has no power under the Constitution to dissolve Parliament.

- iv. The body entitled under the Constitution to fix the date of the first elections within sixty of the expiry of the term of the National Assembly or upon dissolution of the National Coalition by written agreement between the President and the Prime Minister in accordance with section 6(b) of the *National Accord and Reconciliation Act, 2008* is the Independent Electoral and Boundaries Commission.
- v. In accordance with Article 255 of the Constitution, an amendment to the Constitution affecting the term of the President cannot be effected into law without a referendum.
- vi. The terms and conditions of service of Members of Parliament are governed by the National Assembly Remuneration Act (Chapter 5 of the Laws of Kenya) and Parliamentary Pensions Act (Chapter 196 of the Laws of Kenya) which are saved by virtue of the provisions of section 6 and 7 of the Sixth Schedule up to the end of the term of the National Assembly or upon dissolution of the National Coalition.
- vii. The award of costs in matters concerning enforcement of fundamental rights and freedoms protected by the Bill of Rights under Article 22 and 23 and enforcement of the Constitution under Article 258 is in the court's discretion and in this particular case the court orders each party to bear its own costs. "

An appeal was preferred from the foregoing decision of the High Court to the Court of Appeal wherein the Court of Appeal by a majority decision upheld the decision of the High Court. Since the matter involved an interpretation of the constitution, there was room for an appeal to the Supreme Court. That avenue was not pursued.

The conclusion to be drawn from the foregoing is that for disputes *sui generis*, the High Court may be seized of the same by virtue of its wide jurisdiction under Article 165 of the Constitution. The Supreme Court may also be seized of the same if approached within its advisory opinion stream of its jurisdiction. Similarly the Court of Appeal and the Supreme Court may be seized of the same in their appellate jurisdiction stream.

Gaps, Silences, Abeyances and Inconsistencies in the Institutional Framework on

Election Dispute Resolution

The Right of Appeal under Section 41 of the Political Parties Act

Section 41(2) of the Political Parties Act provides that “An Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to both the Court of Appeal and the Supreme Court.”

First, this defeats the principle of expeditious disposal of political parties’ disputes. Nevertheless, it also creates a channel of appeal to the Supreme Court that would appear to conflict Article 163(4) of the Constitution that creates a very limited right of appeal from the Court of Appeal to the Supreme Court.

Whereas section 41(2) appears to create an automatic right of appeal to the Supreme Court on points of law from decisions of the Political Parties Tribunal, the constitution limits the right of appeal (save for constitutional cases) to appeals that have been certified to have raised questions of great public significance.

Overlap in Jurisdiction of PPDT, High Court and IEBC in respect of Certain Electoral Disputes

The jurisdictions of these three institutions have been outlined and discussed in detail above. It was noted that under Section 40 of the Political Parties Act, the Political Parties Tribunal’s jurisdiction relates to: (a) disputes between the members of a political party; (b) disputes between a member of a political party and a political party; (c) disputes between political parties; (d) disputes between an independent candidate and a political party; (e) disputes between coalition partners; and (f) appeals from decisions of the Registrar of Political Parties. It was also noted that in terms of section 40(2), a complainant must exhaust mechanisms internal to the political parties in all the above disputes except (d) and (f).

On the other hand, Article 88 of the Constitution establishes the Independent Electoral and Boundaries Commission with jurisdiction to, among others,

Settlement of electoral disputes, including disputes relating to or arising from nominations, but excluding disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to declaration of election results.

Article 38 of the Constitution recognizes, as fundamental rights enforceable by the High

Court under Article 22 of the Constitution, a body of rights called political rights.

In election processes, and in particular political party nominations, there are bound to be conflicts on the manner in which political parties will have carried out their respective nominations. Where will the disaffected members of the political parties go for redress:

- To the High Court under Article 23 of the Constitution to enforce their Article 38 rights?
- The IEBC Dispute resolution mechanisms under Article 88 of the Constitution?
- Political Parties Tribunal under Section 40 of the Political Parties Act? Or
- Internal parties dispute resolution mechanisms?

The question we pose above is not academic, given the position of the courts (discussed earlier in this chapter) that where the law empowers particular institutions or body, the court will be slow to interfere and that parties should explore the procedures provided for in law. To rephrase the question above: does this view of the courts apply even in cases where there is a clear overlap of jurisdiction? Where fundamental rights are at issue? This part of the chapter does not attempt to respond in any detail to this complex question. However, in view of the centrality of the bill of rights in our democratic dispensation (see Article 19 of the Constitution), we suggest that whatever approach adopted must be one that ensures the fundamental rights are respected and enforced in the most effective manner.

Conclusion and Recommendations

In conclusion, the regime of Kenya's electoral law has vested jurisdiction in various courts, tribunals and institutions to deal with various disputes that may arise in the electoral process. Like any other law, only consistent interpretation of the laws will eventually culminate into certainty. In other areas, amendments to the law will remain inevitable for purposes of certainty and for purposes of dealing with overlaps, gaps, inconsistencies and silences. In a nut shell, the law on the institutional infrastructure for resolution of election disputes in Kenya is still virgin ground in need of exploitation.

A number of recommendations have been made in the body of this chapter on the various themes. However, the following are salient:

Harmonization of jurisdiction of Political Parties Disputes Tribunal and the Independent Electoral and Boundaries Commission on Pre-Election Dispute Resolution

As shown above, nomination disputes, particularly those arising out of the so called political party primaries, are essentially disputes between political parties and their members. Strictly speaking, these would be disputes within the jurisdictional confines of the Political Parties Disputes Tribunal. And yet, a reading of Article 88(4)(e) vests this disputes within the jurisdictional ambit of the Independent Electoral and Boundaries Commission. It is recommended that there is need for legal reform, including constitutional reform to harmonize these jurisdictions. It is recommended that the jurisdiction over party primaries be vested in the PPDT and jurisdiction over disputes relating to presentation of nomination papers to the Commission be vested in the Commission.

Amendment of certain aspects of the Electoral Code of Conduct on exercise of jurisdiction

Regulation 18 in the Electoral Code of Conduct provides that the code shall take effect from the date of dissolution of parliament until polling day. A number of challenges emerge from this prescription, to wit;

- i. Doesn't this make it technically impossible to apply the code to referendum campaigns since there is no dissolution of parliament for purposes of referenda?
- ii. Since Article 102(1) of the constitution prescribes the term of parliament to expire on the date of the next general election, this means that parliament stands dissolved by operation of law on the date of the next general election. What then is the scope of time for which the code can be in force in light of this? This technically means that the code never comes into force.
- iii. How then does one apply this code to campaigns during by-elections? Since there is no dissolution of parliament for purposes of by-elections, this prescription renders the code technically inapplicable to by-elections.

In light of these concerns, there is need for this provision of the code to be amended for purposes of redefining the time when it comes into force. It is suggested that for purposes of elections, the code comes into force at least two weeks to the date set for political party primaries and for purposes of referenda, at least two weeks to the date when the referendum question is to be gazette.

Amending Constitutional Prescriptions Relating to the Supreme Court's Exercise of Jurisdiction in Presidential Elections